No. 99-474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICI CURIAE OF CHAMBER OF COMMERCE OF THE UNITED STATES, ORGANIZATION FOR INTERNATIONAL INVESTMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE , AMERICAN FARM BUREAU FEDERATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS, AND RETAILERS ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF RESPONDENT IN RESPONSE TO THE PETITION

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QUESTION PRESENTED

Whether the U.S. Court of Appeals for the First Circuit correctly held that the Commonwealth of Massachusetts's selective purchasing law targeting commerce with Burma unconstitutionally infringes upon the federal government's exclusive authority over foreign affairs, violates the Constitution's Foreign Commerce Clause, and is preempted by federal Burma sanctions legislation?

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BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(a) on written consent of all parties, the Chamber of Commerce of the United States, Organization For International Investment, National Association of Manufacturers, United States Council for International Business, American Insurance Association, American Petroleum Institute, American Farm Bureau Federation, Associated Industries of Massachusetts, and the Retailers Association of Massachusetts, respectfully submit this brief *amici curiae* in support of Respondent in response to the petition for a writ of certiorari.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are trade associations that have substantial common interests: ensuring stable and predictable legal regimes affecting international trade and investment, and promoting policies that secure for their members and the nation the benefits of free trade. All these organizations participated as *amici curiae* on appeal before the U.S. Court of Appeals for the First Circuit. In addition, the Chamber of Commerce of the United States and the Organization For International Investment participated as *amici curiae* in the proceedings before the U.S. District Court for the District of Massachusetts.

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation, representing more than 2.5 million U.S. businesses and

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[1] Pursuant to Rule 37.6, *amici* state that no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

organizations with 140,000 direct members of every size, sector, and region.[2] While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. Currently, 87 American Chambers of Commerce abroad in 77 countries are affiliated with the Chamber. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization For International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States. Members of OFII transact business throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all workers in the U.S. manufacturing sector and produce more than 80% of the nation's manufactured goods. An additional 158,000 businesses are

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[2] Some members of the *amici* are also members of Respondent National Foreign Trade Council. Memberships may also overlap among the *amici*.

affiliated with the NAM through its Associations Council and National Industrial Council.

The United States Council for International Business ("USCIB") advances the global interests of American business both at home and abroad. As the U.S. affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organisation of Employers, USCIB officially represents U.S. business positions both in intergovernmental bodies – such as the WTO, ILO, OECD, and U.N. system – and vis-à-vis foreign business communities and their governments. The USCIB addresses a broad range of policy issues with the objective of promoting an open system of world trade, finance, and investment. The USCIB membership consists of some 300 global corporations, professional firms, and business associations.

The American Insurance Association ("AIA") is a trade association representing more than 300 companies writing property and casualty insurance throughout the United States and around the world. AIA member companies are affiliated with more than 79,000 independent insurance agents in the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members, to provide a forum for discussion of policy problems of common concern to its members and the insurance industry, and to serve the public interest by participating in litigation that is of significance to the insurance industry.

The American Petroleum Institute ("API") is a non-profit trade association representing over 400 members involved in all aspects of the petroleum industry, including exploration, production, refining, transportation, and marketing. Many of API's members conduct business in foreign countries, and consequently have a direct interest in assuring that access to foreign markets is not unduly restricted by U.S. state and local regulations. In order to ensure that the United States continues to have diverse and

ample sources of energy supplies, energy companies must be able to explore new frontiers, and to participate in international trade and investment.

The American Farm Bureau Federation ("AFBF") is an agricultural membership organization formed to represent the business, economic, social, and educational interests of its members which is comprised of Farm Bureaus in all fifty states, Puerto Rico, and nearly 2,800 counties. With a membership approaching five million families, the AFBF is the nation's largest farm organization. Founded in 1919, AFBF's primary activities include lobbying, public relations, litigation, issue analysis and research, and personal and professional development of member farmers and ranchers. America's farmers have vital interests in the free flow of U.S. agricultural products in foreign commerce.

Associated Industries of Massachusetts ("AIM") is a non-profit business organization with approximately 5,000 members, all of which do business in the Commonwealth of Massachusetts. AIM regularly participates as a party or *amicus curiae* in cases raising issues of general concern for the business community. *See, e.g., Houghton-Mifflin Co. v. Commissioner of Revenue*, 423 Mass. 42 (1996); *AIM v. Secretary*, 413 Mass. 1 (1992). The Retailers Association of Massachusetts ("RAM") is a non-profit business association with approximately 1,500 members, comprised of retail companies of all types and sizes which do business in the Commonwealth of Massachusetts. AIM's and RAM's interest in this litigation stems from the importance of exports to the health of the Massachusetts economy and to the prosperity of Massachusetts businesses.

In aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and, indirectly, much of the U.S. workforce. The *amici* are umbrella organizations charged with representing the legal and policy interests of their business members in matters of national import – such as this

litigation. Not only do the Massachusetts "Burma law" and other similar state and local economic sanctions laws damage the constitutional fabric, but they have had, and if the legal principles confirmed by the First Circuit were not respected would continue to have, a serious financial impact on many of the companies and workers represented by the *amici*.

SUMMARY OF THE ARGUMENT

The Commonwealth of Massachusetts has petitioned for a writ of certiorari to the U.S. Court of Appeals for the First Circuit on the premise that that court's decision in *NFTC v. Natsios*, 181 F.3d 38 (1st Cir. 1999), was in error.

Amici curiae disagree with that premise. This Court has long recognized that the power over foreign affairs and foreign commerce properly rests with the federal government. The First Circuit correctly held that states and localities may not enact selective purchasing laws that unconstitutionally infringe upon the federal government's authority over foreign affairs, that unconstitutionally discriminate against foreign commerce, or that are preempted by federal legislation. *Amici* also reject Petitioners' suggestions that the First Circuit's decision conflicts with this Court's precedents, or that any split of authority on these fundamental principles exists among the Circuits.

Amici believe that the First Circuit's definitive decision was correct, and that it should lead to the invalidation of all similarly defective state and local selective purchasing laws. *Amici* nevertheless face some risk, however: over twenty such laws are still on the books outside the First Circuit, and more could perhaps emerge – an outcome presaged by Petitioners' arguments. *See, e.g.*, Pet. at 16. *Amici*'s members must make significant long-term international trade and investment decisions. Those supplier relationships, sourcing commitments, and capital transfers remain at risk if states and municipalities, notwithstanding the First Circuit's decision, misguidedly follow Petitioners' reasoning. While *amici* firmly believe that such a development would be illegitimate in the face of the First Circuit's ruling (if this Court were to deny the Petition), any possibility of continued unpredictability for businesses is anathema to *amici*.

Accordingly, while convinced that the decision below was correct and that the Petition is substantively unfounded, *amici*'s concern for predictability in the conduct of international business leads them not to oppose the issuance of a writ of certiorari in this case.

ARGUMENT

I. The District Court and the Court of Appeals Correctly Decided the Case, Thereby Averting Fragmentation of Both Foreign Policy and the Flow of Interstate and Foreign Commerce

The Commonwealth of Massachusetts attempted to wield the substantial economic power of its procurement budget to implement its own foreign policy agenda. Specifically, it created a blacklist of companies engaged, however remotely, in commerce with Burma[3] and refused to do business with them in an explicit effort to influence that foreign country's domestic policies. Both the district court and the court of appeals recognized that Massachusetts's "Burma law" impermissibly infringed the federal government's plenary power over foreign affairs. The court of appeals also held that the selective purchasing measure violated the U.S. Constitution's Foreign Commerce Clause, and that it was preempted by federal statutes concerning Burma.

The courts below correctly applied this Court's precedents to uphold the principle that the pursuit of foreign

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[3] In June 1989, the current government decreed that the country's name be changed from the Union of Burma to the Union of Myanmar. For convenience, however, this brief refers to "Burma" throughout.

policy objectives, and the impairment of foreign commerce as a means to that end, are not among the prerogatives of the several states. The Constitution entrusts diplomatic and foreign economic policy to national authorities – that is, to Congress and the President. *Amici* reject Petitioners' suggestions that this Court's precedents have left open the possibility of any contrary result, or that the federal courts are divided on these fundamental issues.

The First Circuit's decision not only correctly applied bedrock constitutional principles and rules of law, but also averted substantial harm to U.S. commercial interests. As *amici* explained in their submissions below, Massachusetts's Burma law would have done grave damage to the free flow of interstate and international commerce.

The Commonwealth's law was only one of more than twenty sub-federal Burma sanctions laws in effect, with more believed to be waiting in the wings. Moreover, Burma is only one of many countries – among them Switzerland, China, Northern Ireland, Saudi Arabia, Egypt, and Turkey – that have been targets of state and local economic sanctions. And human rights abuses are surely not the only grounds a state or locality could cite to support the imposition of international trade barriers. Had the Massachusetts Burma law been permitted to stand, more such laws in support of a variety of foreign policy causes would surely have appeared in the 39,000-plus sub-federal jurisdictions[4] that exist in these United States.

Each individual measure can have a significant economic impact – the Massachusetts Burma law alone restricted bidding on some $2 billion in state purchases.[5] But

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[4] *See* Table 496: Number of Governmental Units, by Type (1997 data, excluding school and special districts), in *Statistical Abstract of the United States* (1998).

[5] *See* Court of Appeals Appendix at 87.

even where the impact of any single law might be limited, the proliferation of selective purchasing measures and other economic sanctions quickly imposes significant burdens on international commerce. As companies are forced to choose between doing business in Massachusetts or in Burma, in Los Angeles or in Switzerland,[6] in Philadelphia or in Northern Ireland,[7] and in Alameda County, California or in Nigeria,[8] for example, interstate and foreign commerce is fragmented and balkanized. Moreover, even the task of tracking such legislation can be beyond the resources of many businesses.

The courts' decisions below – like the constitutional doctrines that they correctly applied – serve to avert this serious economic harm. In holding the Commonwealth's Burma law unconstitutional, they not only reestablished the proper balance between federal and state authority in foreign affairs, but also forestalled the fragmentation of interstate and foreign commerce.

II. Any Continued Controversy over the Viability of Selective Purchasing Laws Would Be Detrimental to the Flow of Commerce

Amici believe that the First Circuit correctly decided the appeal below by applying well-understood precedents of this Court. They expect that the decision will properly lead to the invalidation of state and local international economic sanctions around the country. Should this Court deny the Petition, *amici* believe that every state and locality having or considering such a law would be obliged to acknowledge its constitutional infirmity.

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[6] *See* City of Los Angeles, Cal., Resolution No. 60 (1998).

[7] *See* Philadelphia (Pa.) Code § 17-104(b).

[8] *See* Alameda County (Cal.) Admin. Code ch. 4.36 (1997).

Nevertheless, some economic risk remains for *amici*'s members. Over twenty sub-federal procurement restrictions targeting foreign countries remain on the books in jurisdictions beyond the First Circuit's boundaries. *Amici* believe that those measures are invalid and that they face the same fate as the Massachusetts Burma law. But companies must make long term investment decisions about doing business abroad, and about doing business in states and localities across the United States. They must enter into long term supplier and distribution relationships abroad, while at the same time considering carefully the opportunities for sales to state and local entities. No matter how clearly invalid a selective purchasing law is in light of the First Circuit's ruling, it can still affect companies' business judgments by exposing them to at least some risk of being denied access to the government procurement market by a dissident local government.

Such risks will only be compounded if state and local legislators mistakenly believe Petitioners' arguments alleging the existence of doctrinal ambiguities to be valid. In that circumstance, they might well proceed – in error and contrary to law – to enact additional international economic sanctions notwithstanding the First Circuit's decision. The prospect that some small number of states and municipalities might continue to impose economic sanctions to achieve a multitude of self-proclaimed – and possibly conflicting – foreign policy goals heightens the risk of both conflict with our trading partners and retaliatory actions against U.S. businesses. Worse still, one can imagine the economic turmoil that would result if businesses properly proceed on the assumption that all such laws are indeed invalid, only to encounter a contrary decision by this Court years from now in another case.

Amici are quite concerned about the delay, confusion, and commercial uncertainty that could confront their members in the scenarios described above. Accordingly,

even though they entertain no doubt whatsoever as to the correctness and precedential clarity of the court of appeals' decision, they would welcome the finality that a ruling from this Court would provide. While *amici* do not consider that a definitive statement from this Court is necessary to support the nationwide invalidation of state and local international economic sanctions, they of course appreciate that such a holding would conclusively resolve the matter. Moreover, taking a decision in this particular case (in which the facts are undisputed, and the issues of law are clearly presented) would secure these benefits with a minimum of delay.

CONCLUSION

Although *amici* are fully convinced that the case was correctly decided by the U.S. Court of Appeals for the First Circuit, and although they reject the bases for the Commonwealth's Petition, a ruling by this Court regarding the invalidity of selective purchasing laws would secure predictability and finality for U.S. and international business activities. Accordingly, *amici* do not oppose the issuance of a writ of certiorari in this case.

Respectfully submitted,

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